Office - Supreme Court, U. S.
FILED
NOV 19 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 82

DULAC CYPRESS COMPANY, LTD., AND J. M. BURGUIERES COMPANY, LTD.,

Petitioners,

versus

WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL,

Respondents.

PETITION OF DULAC CYPRESS COMPANY, LTD., AND J. M. BURGUIERES COMPANY, LTD., PETITIONERS, FOR A REHEARING.

ROBERTS C. MILLING,
Attorney for Petitioners.

HAYWOOD H. HILLYER, JR.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

No. 82.

DULAC CYPRESS COMPANY, LTD., AND J. M. BURGUIERES COMPANY, LTD.,

Petitioners,

versus

WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL,

Respondents.

PETITION FOR REHEARING.

Come now Dulac Cypress Company, Ltd., and J. M. Burguieres Company, Ltd., who present this, their petition for a rehearing on their application for a writ of certiorari in the above entitled cause, and, in support thereof, respectfully show:

I.

(a) That in the case of *"Wm. S. Lovell, et als. v. Andrew Fitzpatrick, et als."*, No. 11,193 of the docket of the

17th Judicial District Court for the Parish of Terrebonne, State of Louisiana, the respondents herein brought an action similar to this action against certain defendants, and that said defendants, in defense of said action, set up the same instrument executed by the Register of the State Land Office (R. 29) which is relied upon by petitioners herein as constituting a valid conveyance by the State of Louisiana to petitioners' ancestor in title of the lands in dispute.

(b) That in an application for a rehearing (R. 127) addressed to the United States Circuit Court of Appeals for the Fifth Circuit, petitioners called the attenion of said Court to the pendency in the state court of suit No. 11,193, and requested that no final decree be rendered in this case until a final determination of the state court proceeding on the ground that the decision by the state court would be followed by the Federal courts; that the Circuit Court of Appeals refused the rehearing and its judgment became final. (R. 140.)

(c) That on April 8th, 1941, (see petitioners' brief, Appendix "A"), a decision was rendered in said case No. 11,193 decreeing the instrument executed by the Register of the State Land Office to be a valid and effective conveyance and rejecting the demands of the plaintiffs in that suit (respondents herein); that no suspensive appeal was taken in said action within the delay allowed by law, and therefore said judgment is now final and execution may be had thereon (Art. 575, Louisiana Code of Practice); that a devolutive appeal may be taken within one year from the rendition of the judg-

ment (Art. 593, Louisiana Code of Practice), but that such devolutive appeal will not suspend the execution of the judgment (Art. 578, Louisiana Code of Practice).

(d) That the decision in said case No. 11,193 squarely passes upon the validity and effect of the instrument signed by the Register of the State Land Office, at issue in this case, and if said decision is followed by this Court, of necessity it will require a reversal of the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered herein.

(e) That, as discussed in petitioners' brief, pp. 27-28, the decision of the 17th Judicial District Court for the Parish of Terrebonne is entitled to the same weight and dignity as a decision of the Chancery Court of New Jersey; that the decisions of the Chancery Court of New Jersey have been held to be binding upon the Federal courts in matters on which the highest New Jersey appellate court has not spoken. *Fidelity Union Trust Co. v. Field,* 311 U. S. 169, 85 L. Ed. 109.

(f) That there is no decision either of the Louisiana Supreme Court or of the Louisiana Courts of Appeal which passes upon the precise question here involved, and therefore, **at the present time the decision in case No. 11,193 is the law of Louisiana** and will so remain until a higher state court decrees to the contrary.

(g) That, accordingly, the said decision of the 17th Judicial District Court is binding upon the Federal Courts, and certiorari should issue herein to correct the error of

the Circuit Court of Appeals for the Fifth Circuit in deciding this case contrary to the state law on the subject, *Fidelity Union Trust Co. v. Field, supra;* and see authorities cited in petitioners' brief, pp. 25-28.

II.

(a) That if no appeal is taken by respondents herein in the said suit No. 11,193, then, since a higher court will not have passed upon the subject, the decision in said case will remain the law of Louisiana upon this express point, and will be diametrically opposed to the decision of the Fifth Circuit in this case.

(b) That if an appeal is perfected from said judgment, it seems likely that the Supreme Court of Louisiana may affirm the judgment of the 17th Judicial District Court, with the result that the state law will be the exact antithesis of the federal law in regard to the construction and effect of the selfsame instrument.

(c) Therefore, in the event that the Court does not see fit to issue certiorari herein and reverse the decision of the Circuit Court of Appeals for the Fifth Circuit on the basis set forth in Article I, then, in order to avoid the possibility of a conflict between the state and federal decisions, the Court should grant the writ and remand the case with instructions that any decision herein should be postponed, pending the eventual result of the state court proceedings.

III.

In addition to the above reasons for granting a rehearing herein, and in order that the ends of justice may be served, petitioners respectfully show the Court as follows:

(a) That in the instant case petitioners have always contended that an actual conveyance of the lands in dispute had been executed by the State of Louisiana in favor of the Board of Commissioners of the Atchafalaya Basin Levee District (petitioners' ancestor in title) but that the deed of transfer had been lost or mislaid; that the District Court held that the original existence of this transfer had not been established; and that this ruling was affirmed by the Circuit Court of Appeals.

(b) That petitioners made extensive and diligent efforts to locate the deed which they contended had been executed but were unsuccessful.

(c) That on October 3rd, 1941, the Chief Deputy Clerk of Court of the Parish of Terrebonne discovered in the Court House at Houma, Louisiana, an original act of transfer by the State of Louisiana to the Board of Commissioners of the Atchafalaya Basin Levee District dated November 10th, 1896, and covering, among other lands, the lands here in question; the said act of transfer being copied in full and annexed hereto as Exhibit "A", and the circumstances of the discovery of said document being set forth in an affidavit by H. C. Wurzlow, Chief Deputy Clerk of Court, Parish of Terrebonne, dated October 10th, 1941, which is copied in full and annexed hereto as Exhibit "B".

(d) That said original act of transfer is the very act which petitioners always contended had been executed,

but which they had been unable to find; that same is determinative of the instant case, and, if introduced in evidence, would require a reversal of the judgment rendered herein by the Circuit Court of Appeals.

(e) That this new evidence is documentary in character, is material to the issues involved herein, and could not, with due diligence have been discovered before. (See *Intravia v. Dixie Homestead Ass'n,* 192 La. 1087, 190 So. 226.)

(f) That in order to prevent a manifest injustice arising because of this situation, this Honorable Court should grant certiorari and remand the case with instructions to permit the introduction of the newly discovered evidence. (See *Schneider v. Aetna Life Ins. Co.,* 30 La. Ann. 1198, 1200.)

For the foregoing reasons it is respectfully urged that a rehearing be granted herein, that a writ of certiorari issue, and that the decree of the United States Circuit Court of Appeals for the Fifth Circuit be reversed, all as prayed for in petitioners' original petition for certiorari.

In the alternative, and in the event that upon the issuance of the writ of certiorari, the decree of the Circuit Court of Appeals is not reversed, then it is respectfully urged that the writ of certiorari be granted and that this case be remanded with instructions to permit the introduction in evidence of the above mentioned newly discovered deed, and thereafter, to postpone any decision herein pending the final outcome of the case of *"Wm. S.*

Lovell, et als. v. Andrew Fitzpatrick, et als.", No. 11,193 of the docket of the 17th Judicial District Court for the Parish of Terrebonne.

Petitioners further pray for such other and further relief in the premises, both legal and equitable, as to this Honorable Court may seem meet and just.

ROBERTS C. MILLING,
Attorney for Petitioners.

HAYWOOD H. HILLYER, JR.,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, ROBERTS C. MILLING, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

ROBERTS C. MILLING,
Attorney for Petitioners.

EXHIBIT "A".

List of lands situated in the Parish of Terrebonne.

Lelovesque, Est. of J. B. & als.

A certain lot of ground situated on the Bayou Terrebonne, in this Parish, at about fifteen miles above the town of Houma, bounded above by land of Theodule Stevens and below by land of Lamant Legime,

Sold for Taxes 1894. Total $4.62.

Labit, Dacis.

A certain tract of land situated on the Bayou Little Caillou in this Parish, at about twenty-two miles below the town of Houma containing 295 acres bounded above by Daspit & Daspit and Trahan and below by Joseph Lecompte.

Sold for Taxes 1894. Total $16.39.

Labit, Dacis.

A certain tract of land situated on the Bayou Little Caillou in this Parish at about twenty-two miles below the town of Houma and containing 32 acres, bounded above by land of C. W. Duplantis and below by land of the Estate of James Lirette.

Sold for Taxes 1894. Total $5.61.

Lovell, W. S.

1°—A certain tract of land being 23, 24, 25, 26, 27, 28, 29 & 30. 2°—Lots 2, 3, 4 of Section 69 and fractional Section 74 T 19 SR 17 E all containing fourteen hundred and three acres.

Sold for Taxes 1894. Total $63.33.

Lovell, W. S.

389 acres of land being the East ½ of E ½ of Section 73 and SE ¼ of SE ¼ of Section 77 and SW¼ of NE ¼ and S ½ of Section 76 T 10 SR 17 E.

Sold for Taxes 1894. Total $19.48.

Picou, Eusibe.

A certain tract of land situated on the Bayou Little Caillou in this Parish at about twenty miles below the town of Houma, containing sixty-one acres of land, bounded above by state lands, and below by land of Hypolite Chauvin.

Sold for Taxes 1893. Total $8.77.

Picou, Eusibe.

A certain tract of land situated on the Bayou Little Caillou in this Parish, at about twenty-seven miles below the town of Houma, containing sixty-one acres, bounded above by state lands and below by land of Hypolite Chauvin.

Sold for Taxes 1894. Total $4.47.

Picou, Eusibe.

A certain tract of land situated on the Bayou Little Caillou in this Parish at about twenty-two miles below the town of Houma, containing eighty-eight acres, bounded above by land of Trahan Brothers and below by Drazile Eshte, sold for Taxes 1893 & 1894. Total $12.91.

Watkins, Jr., G. W.

A certain tract of land situated on the Bayou du Large, in this Parish containing three hundred and sixty acres bounded above by land of the Estate of Bernard Mermande and below by Felix Theriot.

Sold for Taxes 1894. Total $16.48.

Viguerie, Adolphe.

600 acres of land being the rear part of Sections 22, 23, 24 and lot 1 of Sections 39, 40, 41, 42 T 20 SR 18 E.

Sold for Taxes 1894. Total $23.69.

The above and foregoing described lands situated in the Parish of Terrebonne having been acquired by the state at tax sale for the non-payment of taxes and not redeemed within the time prescribed by law hereby transferred to the Board of Commissioners of the Atchafalaya Basin Levee District as provided for in Act 97 of 1890.

Witness my Official signature and seal of Office, this the 10 Nov., A. D. 1896.

(Signed) W. W. HEARD,
Auditor.

(Seal)

EXHIBIT "B".

State of Louisiana,
Parish of Terrebonne.

Before me, the undersigned authority, this day personally came and appeared: HERBERT C. WURZLOW, to me personally known, a resident of and domiciled in the Parish of Terrebonne, Louisiana, and who, upon being by be first duly sworn, did depose and say: That he is presently Chief Deputy Clerk of Court and Ex-Officio Recorder in and for the Parish of Terrebonne, Louisiana, and has held such position continuously since the year 1924;

That on October 3rd, 1941, while examining a lot of old loose papers contained in card-board boxes which had been stored in the basement vault of the Clerk's Office after the completion of the New Courthouse in 1938, affiant proceeded to open a rolled package of papers labeled "Police Jury Meetings, etc.", and discovered two documents, one following the other, purporting to be original transfers by the State of Louisiana to the Board of Commissioners of the Atchafalaya Basin Levee District, dated November 10th, 1896 and September 28th, 1899, respectively, and purporting to have been signed by W. W. Heard, Auditor;

That said documents bore no filings or certificates of recordation other than a pencil memorandum "For recordation 4/21/03 C. A. Celestin", on the back of the one dated September 28th, 1899, and the Conveyance Records of the Parish of Terrebonne failing to disclose that they had ever been placed of record, affiant, realizing the importance of said documents, immediately gave voice to his discovery to Mr. Claude Ellender, an attorney at law of Houma, Louisiana, who was then present in the office, and

who suggested that affiant file and record said documents in the Conveyance Records of Terrebonne Parish;

That shortly thereafter affiant received a long-distance telephone call from the office of Milling, Godchaux, Saal & Milling, Attorneys at Law, of New Orleans, Louisiana, and was requested by Mr. Roberts C. Milling, of said firm, as attorney for The Louisiana Land & Exploration Company, to file and place said documents of record;

That acting on such instructions, affiant filed said documents for record on said October 3rd, 1941 at 4:10 o'clock p. m., under File Numbers 48043 and 48044, respectively.

H. C. WURZLOW.

Sworn to and subscribed before me at Houma, Parish of Terrebonne, Louisiana, this 10th day of October, A. D. 1941.

R. W. BAZET,

(Seal) Clerk of Court and Ex-Officio Notary Public.